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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 620

THE BUCKEYE STEAMSHIP COMPANY,
Petitioner,

vs.

JOSEPH McDONOUGH,
Administrator of the Estate of William F. Kerr, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit
and
BRIEF IN SUPPORT OF PETITION.

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Administrator of the Estate of William F. Kerr, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioner, The Buckeye Steamship Company, hereby petitions for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, rendered herein on December 19, 1952.

STATEMENT OF FACTS.

This matter involves an action for wrongful death. It was brought under the provisions of the so-called Jones Act, by the administrator of the estate of the decedent, on behalf of the decedent's two minor children against the Petitioner as owner of the Steamer Andrew S. Upson. The decedent was a member of the engine room crew of the Upson and his death, by drowning in the Cuyahoga River, occurred on April 25, 1947, while he was returning to the vessel from a personal errand ashore. (R. pp. 64, 65.)

The cause was tried to the United States District Court at Cleveland, without a jury and on January 21,

1952, final judgment was entered in favor of the plaintiff in the amount of Five Thousand and Four Hundred Fifty Dollars ($5,450.00) with interest from the date of the judgment. (R. pp. 6, 71.) On December 19, 1952 the Court below affirmed, without opinion, with judgment being entered on the same date. (R. p. 79.) The facts upon which these judgments are based are undisputed and this Court is, therefore, not required to review them.

The Upson, which is a Great Lakes freighter of conventional design, arrived at the Corrigan-McKinney dock of the Republic Steel Corporation during the afternoon of April 24, 1947 and, at about 10:45 P. M. on that date, began the discharge of her cargo of iron ore. (R. pp. 44, 65.) The dock area, which is immediately adjacent to the waters of the Cuyahoga River, is enclosed by a steel fence and contains thereon Hulett unloaders, ore piles, traveling overhead cranes and railroad tracks, all of which are owned and controlled by the Republic Steel Corporation. (R. pp. 12, 65.) A gate house is located at the entrance to the dock which is staffed by plant police officers and all persons who enter or leave the dock area are checked through by these officers who are employed by Republic. The Upson on the night in question was moored starboard side to the dock with her stern about 1500 feet from the gate house. The usual and customary method of traveling to and from vessels at the docks is by means of a path, approximately 18 feet wide which runs parallel to the river between the edge of the dock and adjacent railroad tracks for a considerable distance and then runs away from the dock to the gate house. (R. pp. 8, 11, 12, 68.) The dock does not have guard rails.

The decedent was a coal passer. His regular watch was from 12 to 4 (A. M. and P. M.) and at about 4:05 P. M. he left the vessel and went ashore upon what was ad-

mittedly personal business. He left the dock area through the gate house where he was required to sign out on the gate house log. At about 12:15 A. M. on April 25th he returned to the gate house by taxi and, it being apparent to the guard on duty that he was intoxicated, he was detained, after he had signed in, until another crew member of the Upson, Cox by name, who was also returning from a personal errand ashore, arrived and agreed, in compliance with a request from the guard, to assist him to the vessel. (R. pp. 34, 65, 66.)

The decedent and his companion left the gate house and walked along the path, without any difficulty, to where it began to run parallel to the river. Not long after they had started along the portion of the path which paralleled the river Kerr staggered and fell to the ground. Cox helped him to his feet and admonished him for being intoxicated. Kerr became angry because of this chastisement and, after a second fall, Kerr indicated, very forcefully, that he did not want to accompany Cox any farther. (R. pp. 35, 67.) At this time they were at a point about midway between the gate house and the vessel's stern. Cox did not see anyone who could assist him in getting Kerr the remaining distance to the vessel. He left the decedent and walked rapidly towards the stern of the vessel. (R. pp. 36, 67.) The vessel had just finished shifting at the time of his arrival, but the stern ladder was not yet down. He went aboard by means of one of the unloading machines and reported to the Third Mate, who was in charge of the deck that there was a coal passer down the dock a ways who was drunk. Cox then went forward and changed his clothes preparatory to going to work. The Third Mate, who could not leave the vessel because of his duties in connection with the shifting operation, advised the Second Assistant Engineer, who was

Kerr's superior, that his coal passer was along on the dock drunk. (R. pp. 24, 68.) That officer went on deck preparatory to going ashore to get Kerr, but was delayed in doing so for about ten minutes because the vessel was again being shifted. After getting ashore he and a guard searched the dock area, without success. Approximately a week later the Coast Guard recovered Kerr's body from the river. An autopsy showed death by drowning and that at the time of death his body contained .24 percent blood alcohol and .38 percent urine alcohol, indicating that at that time he had been in a state of severe intoxication. (R. pp. 14, 16, 24, 27, 68.)

There was testimony, given by two officers of the vessel, that it was the custom, if intoxicated seamen were being held at the gate for the guards to either contact the vessel, or, without such contacts being made, for them to make their own arrangements to have the men accompanied by sober shipmates. (R. pp. 28, 29, 54, 55.)

The decedent was divorced at the time of his death. He left surviving him as dependent next of kin a son, age nine, and a daughter, age ten. The Petitioner does not dispute the amount of the judgment, as such. (R. p. 69.)

THE DECISIONS BELOW.

The District Court, on August 21, 1951, ruled that inasmuch as Kerr was returning to his vessel by a customary route and was upon property adjacent to the vessel at the time of his death, he was acting within the course of his employment. It ruled that Cox, in leaving Kerr unattended on the dock, was negligent and that as he was acting in line with a well established practice in taking charge of Kerr, he was acting within the scope and course of his employment so as to charge the vessel owner with liability for that negligence. It rejected the vessel owner's

contention that the decedent's own misconduct was the proximate cause of his death and ruled that it had resulted from Cox's failure to exercise ordinary care for Kerr's safety. (R. pp. 58-64.)

The Court of Appeals, in affirming the judgment of the District Court, said (R. p. 79):

> "From all of which it appears that the findings of fact are supported by substantial evidence and are not clearly erroneous, but indeed are virtually unchallenged, and that the conclusions of law are correctly drawn for the reasons stated in the opinion of the court;"
>
> "And, upon the basis of the authorities cited in the opinion of the District Judge [See especially *Lavender v. Kurn*, 327 U. S. 645, 653; *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36; *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 67; *Marceau v. Great Lakes Transit Corp.*, 146 F. (2d) 416, 418 (C. A. 2); *Wong Bar v. Suburban Pet. Transport, Inc.*, 119 F. (2d) 745 (C. A. 2)];"

"The judgment of the District Court is affirmed."

QUESTIONS PRESENTED.

1. Whether, under the Jones Act, a seaman who is returning to his vessel, by a customary route, from a personal mission ashore and who dies while traversing a dock over which his employer has neither ownership nor control, is acting within the course of his employment.

2. Whether, under the Jones Act, a vessel owner is responsible for the alleged negligent acts of a seaman who, in returning to his vessel from a personal mission ashore, agrees to accompany an intoxicated shipmate from the gate house to the vessel, if in so doing he was acting in conformance with a practice known to and acquiesced in by the vessel owner.

3. Whether, in the absence of proof as to the proximate cause of Kerr's death, liability may be predicated upon the speculative conclusion that leaving him unattended on the dock constituted that cause.

4. Whether, under the Jones Act the decedent's voluntary intoxication precluded his personal representative from recovering death benefits.

REASONS FOR GRANTING THE WRIT.

1. An authoritative determination, by this Court, of the question as to whether the fact that a seaman is returning to his vessel from a personal mission ashore, precludes his activities from being "within the course of his employment" is, we respectfully urge, required. Also, the decision below is in conflict with the rationale of two decisions of the Court of Appeals for the Ninth Circuit.

In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, jurisdiction, under the Jones Act, was extended to injuries which occurred on land. In that case, however, the accident happened while the plaintiff was admittedly engaged in the performance of his duties as a seaman, in response to orders from his superiors and no issue as to whether he was or was not engaged in activities within the course of his employment was raised.

During the same term this Court, in *Aguilar v. Standard Oil Company*, 318 U. S. 724, ruled that maintenance and cure were recoverable for injuries sustained during the accomplishment of personal pursuits ashore. This Court has not, as far as we are aware, ever ruled on the question as to whether the considerations which stamp personal activities ashore as being "within the service of the ship" in the maintenance and cure field, apply with equal validity to the "course of employment" requirement

in the field of negligent injuries under the Jones Act. Certain inferior Federal Courts have ruled that the phrases are synonymous. If, however, the elastic doctrines of the maintenance and cure field, where recovery is not based upon the establishment of fault, but is recognized as an implied provision of the contract of marine employment, are to be extended to cases where negligence is the gravamen of the cause of action, that extension should only be accomplished after this Court has considered the question and given its approval. We know, by reason of what this Court has already said, that the fact that an accident happens ashore does not preclude the existence of a cause of action under the Jones Act and we know also that personal activities, unless they amount to wilful misconduct, do not operate to deprive a seaman of any of his rights to be maintained and cured at the vessel owner's expense. It is in the area between these two well established doctrines, however, that obscurity still exists and where clarification is required. The question, involving as it does a construction of the Jones Act, is of substantial public importance.

2. The judgment herein imposes liability upon a vessel owner for the acts of an employee who at the time of his alleged negligence was on a personal mission ashore. The question as to what responsibility, if any, the shipowner assumes by reason of the activities of sober crew members in assisting their intoxicated shipmates back to their vessels is of wide application and general importance. It has marked significance for seamen and their representatives as well as for vessel owners and marine underwriters.

3. This case presents an unwarranted application of the doctrine set forth in *Lavender v. Kurn*, 327 U. S. 645. It is still the law, as announced by this Court, that liability,

under the Jones and Federal Employers' Liability Acts, cannot be based upon mere speculation.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket No. 11,549, *The Buckeye Steamship Company v. Joseph McDonough, Administrator, etc.*, and that said judgment of the United States Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as may seem meet and just.

THE BUCKEYE STEAMSHIP COMPANY,

By LUCIAN Y. RAY,

Attorney for Petitioner.

McCREARY, HINSLEA & RAY,

Of Counsel.

In the Supreme Court of the United States

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No. . . . . .

THE BUCKEYE STEAMSTIP COMPANY,
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JOSEPH McDONOUGH,
Administrator of the Estate of William F. Kerr, Deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is reported at 103 F. Supp. 473 and appears in the record herein at pages 58 to 64. The United States Court of Appeals for the Sixth Circuit did not file an opinion. Its order of affirmance is reported at 200 F. (2d) 558 and appears in the record herein at page 79.

JURISDICTION.

The judgment of the United States Court of Appeals was entered December 19, 1952. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

STATUTES INVOLVED.

The pertinent portions of the Jones Act (46 U. S. C. A. Section 688) are as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railroad employees shall be applicable * * *."

Also involved is the Federal Employers' Liability Act. (45 U. S. C. A. 51-59.)

STATEMENT OF THE CASE.

The undisputed facts, pertinent to this petition, have been set forth in the petition under the section entitled Statement of Facts and will be omitted here.

SPECIFICATION OF ERRORS.

1. The courts below erred in ruling that the decedent in returning to his vessel by a customary route, from a personal mission ashore, was acting within the course of his employment.

2. The courts below erred in ruling that Cox, in accompanying the decedent from the gate house to the vessel, was acting within the scope of his employment so that his employer is chargeable with liability for his acts.

3. The courts below erred in ruling that Cox, in leaving Kerr unattended on the dock, was guilty of negligence which was the proximate cause of Kerr's death.

ARGUMENT.

Point I.

The decision below is in conflict with the rationale of decisions in the Court of Appeals for the Ninth Circuit on the question of whether shore leave operates to preclude a seaman's activities from being within the course of his employment. This conflict, untouched by this Court in either the O'Donnell or Aguilar decisions, should now be resolved.

Counsel for the respondent, in the Court below, conceded that the third portion of the decision in *Todahl v. Sudden & Christensen,* 5 F. (2d) 462 (C. C. A. 9), supports our contention that a seaman on shore leave is not acting in the course of his employment, but urged that that case has been overruled, by implication, by this Court in the *Aguilar* case, *supra,* and has been superseded by the case of *Marceau v. Great Lakes Transit Corp.,* 146 F. (2d) 416 (C. C. A. 2), upon which the Court below relied.

The *Todahl* case involved an injury to a seaman who had gone ashore for personal reasons and who was injured by reason of a defect in the dock. The decision was in favor of the vessel owner because the Court concluded that the obligation to provide a safe place to work did not extend to property over which the employer had no dominion or control, but the Court also summarily rejected the plaintiff's contention that liability should be imposed because the injury had occurred while the seaman was acting in his employer's service. In so doing the Court said (p. 464):

> "* * * It is argued that the plaintiff was injured while in his employer's service, inasmuch as he was under obligation to return to the vessel and was required to pass over the wharf. It is true, as we held in *Lam-*

phere v. Oregon Navigation Co., 196 F. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1, *that an employee is in the service of his master whenever he is doing that which under his contract of employment he is bound to do. But here the plaintiff, in voluntarily going ashore, and thus by his own act making his return necessary, was not doing that which his contract of employment bound him to do.* * * *" (Emphasis supplied.)

In *Toyo Kisen Kaisha v. Hartman*, 253 F. 422 (C. C. A. 9) the seaman had been ashore on personal business and was injured while attempting to step from a launch to the ship's ladder. The appellate court reversed the judgment which the trial court had entered in favor of the plaintiff. Here, again, the basis for the reversal was the doctrine that the obligation to provide a safe place to work does not include the means of access to a seaman's place of employment when he is returning to his vessel from personal business ashore. The Court said (p. 424):

> "We are of the opinion, however, that the rule referred to has no application to the facts of the present case; for, as shown by the evidence without dispute, neither in going from or returning to the ship was the defendant in error traveling for any purpose connected with the business of his employer, but solely for his own pleasure and purposes. * * *"

In *Nowery v. Smith*, 69 F. Supp. 755, affirmed without opinion in 161 F. (2d) 732 (C. C. A. 3) the injured seaman was beaten while on shore leave by a fellow crew member. The Court, in determining that the plaintiff was still in the course of his employment at the time of his injury, said (p. 757):

> "* * * And if, for the purpose of determining the shipowner's liability for maintenance and cure, the seaman is said to be on 'the shipowner's business' while

> on shore leave, I can see no valid reason why, for the purpose of determining the shipowner's liability under the Jones Act, the seaman should not be said to be, 'in the course of his employment' at the same time. It is simply a question of defining the seaman's status; and I think that the concepts 'on the shipowner's business,' and 'in the course of employment,' as they are applied to the seafaring trade, comprehend identical factual situations."

The Court reached the conclusion above set forth as a result of its analysis of this Court's decision in the *Aguilar* case, *supra*. It conceded that the decision in that case was limited to the facts therein, but it felt that the reasons, which caused this Court to conclude that a seaman was still in the "service of the ship" while enjoying shore leave, were equally applicable to the course of employment doctrine under the Jones Act. We believe, in contradistinction to the conclusions of the Court in the *Nowery* case, that the question presented there and the one that is presented here, involves more than a simple defining of the seaman's status, from a factual standpoint. There is inherent in these cases the problem as to whether, conceding the personal nature of the seaman's activities, the operative effect of applying them to the comparatively narrow and constricted field of liability, under the Jones Act, is or should be the same as when they are applied to the wide and comprehensive field of maintenance and cure.

We have, in light of the above mentioned statements concerning the implications which allegedly flow from the *Aguilar* case, reexamined that decision. It appears to be exceedingly clear that this Court, in that opinion, intended that the rulings should be confined to the maintenance and cure field and, perhaps, to a rather narrow factual situation in that field. In ruling that a shipowner's lia-

bility for maintenance and cure extends to a seaman who is injured, on shore leave, while proceeding either to or from the vessel by the only available route this Court did not touch the wider issue as to whether a similar right to recover would have existed if the seaman had been neither going from nor returning to the vessel at the time of the accident. The opinion examines the origin and nature of the obligation to pay maintenance and cure and exhaustively considers the meaning of the phrase "in the service of the ship," but there is not even the faintest suggestion that it is synonymous with the phrase "in the course of his employment," or that its principles are applicable to the negligence field.

We respectfully urge that, with lower Federal Courts (see *Kyriakas v. Goulandris,* 151 F. (2d) 132, 138, C. C. A. 2) persisting in reading their own implications into the *O'Donnell* and *Aguilar* decisions and with a conflict existing between circuits as to the shipowner's liability for negligently sustained injuries which occur on shore leaves the applicable principles should be redefined by this Court.

Point II.

The companion question as to whether a shipowner is responsible for the acts of an employee who, himself, is returning to his vessel from a personal mission ashore, involves a construction of the "scope of employment" doctrine under the Federal Employers' Liability Act and is of wide general importance.

We have here a situation involving two men, one drunk, and the other sober. Both were crew members of the same vessel and both were returning to the vessel from personal missions ashore. Both were due on watch and both, because of this requirement, arrived at the gate house

at about the same time. The sober one was requested to take the drunk one to the vessel and agreed to do so. The vessel owner, although aware that, on occasions, the guards did ask sober crew members to accompany their intoxicated shipmates, did not, at the times here involved, know that either man was even in the vicinity. With both men engaged in personal pursuits and neither of them subject, at the time, to the control which is the cornerstone of the doctrine of *respondeat superior* liability was, nevertheless, imposed. A mere recital of the events which culminated in the tragedy emphasizes the length to which the Trial Court has gone in fixing responsibility. If this is ultimately held to be the measure of the vessel owner's responsibility towards the wayward members of his crews a reexamination of prevailing practices relative to those crew members will be required. If, as the courts below have ruled, a sober seaman, by taking his drunken shipmate in charge, in getting him back to the vessel, is acting in furtherance of his master's interest, what, is the natural inquiry, are the limits beyond which both the helped and the helper are definitely on their own. Shipmates make a practice of mingling together on shore leave and the "caretaking" of the intoxicated by the sober frequently begins in the taverns where the merrymaking begins. Is this "caretaking," this solicitude for the welfare of their less steady comrades equally a service rendered for the benefit of their masters and, if that "caretaking" is carelessly done, are the vessel owners liable, in damages, for injuries which have resulted? These are some of the far reaching implications of the ruling in the instant case relative to Cox's status.

In *Angco v. Standard Oil Company of California,* 66 F. (2d) 929 (C. C. A. 9) the Court ruled that an injury caused by a chief engineer who was hurrying back in a

company car to his vessel, had not occurred within the scope of his employment. A verdict which had been directed in favor of the vessel owner was affirmed. The Court said (p. 930):

> "When Warner left the ship at Kahului he was off duty, upon pleasure bound, and was beyond the scope of his employment. Unless some unforeseen emergency arose he would not again come within the scope of his employment until he returned to the vessel. He was under no instructions to perform any service in any way connected with his employment; his sole responsibility, to return to his ship before she sailed, was a personal one. * * * From the facts established by the testimony of appellants' witnesses it cannot be said that Warner was acting within the scope of his employment. He was about his own business and on his own free time."

Cox was a wheelsman on the Upson and his accompanying of the decedent had nothing whatever to do with his duties as a member of the crew of that vessel. He, while on shore leave, was, like Warner, in the above case, "off duty and upon pleasure bound." Certainly during the period prior to his arrival at the gate house it cannot be reasonably argued that his activities were within the scope of his employment. The question as to whether his acceptance of the responsibility of "escorting" the decedent to the vessel operated to change his status and bring his subsequent activities within the scope of that employment is of far reaching and significant importance. The factual situation here involved, with the sober seaman "walking" his shipmate back to the vessel, is of frequent occurrence and all marine interests are anxious to secure an authoritative ruling as to the legal implications which arise from that type of "walking."

Point III.

The Courts below erred in using the doctrine of Lavender v. Kurn as justification for the conclusion that Cox's negligence was the proximate cause of the decedent's death.

The Trial Court quoted the following language from *Lavender v. Kurn,* 327 U. S. 645, 653 (R. p. 62):

> "* * * Whenever facts are in dispute or the evidence is such that fair-minded men, may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. * * *"

and, using that doctrine as an authority, concluded that in the absence of any suggestion as to suicide or foul play the most reasonable inference was that Cox's negligence was the proximate cause of Kerr's death. (R. p. 63.)

The Court's reasoning was highly specious. There was no proof nor even any suggestion in the case that suicide or foul play were possible causes of death and the Court was not required to, nor did it make a real choice between those two alleged causes on the one hand and the negligence of Cox on the other. The Court did not choose the most reasonable of several different inferences. What it did do was reach a conclusion which was without the required factual foundation.

This Court, in *Lavender v. Kurn,* ruled that reversible error exists where there are no probative facts to support a conclusion (p. 653). Such a lack of probative proof exists in the case at bar.

There is no proof that, if Cox had remained with Kerr, the latter would have lived, and yet the conclusion reached by the Court that Cox's leaving was the proximate

cause of the tragedy, must necessarily be based, if sound, upon such a fact, either proved or justifiably inferred. It is not possible, without entering into the field of speculation and conjecture to determine whether Cox could or would have saved Kerr's life had he remained with him and such speculation and conjecture is still condemned by this Court.

An excellent statement of the controlling principle is contained in *St. Louis-San Francisco R. Co. v. Mills*, 271 U. S. 344, which involved an action under the Federal Employers Liability Act. One of the principal issues was the cause of the decedent's death and in ruling that the jury should not have been allowed to speculate as to whether the presence of an additional guard or guards would have saved the decedent's life this Court said (p. 347):

> "Nor is there evidence from which the jury might infer that petitioner's failure to provide an additional guard or guards, was the proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companions had seated themselves in the car. Without warning they fired a volley into the car and fled. Decedent and his guard were armed, but had no opportunity to defend themselves. On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present. See *Chicago, M. & St. P. Ry. Co. v. Coogan, post*, p. 472; *Patton v. Texas & Pacific Ry. Co., supra; Reading Co. v. Boyer*, 6 Fed. (2d) 185; *Midland Valley R. R. Co. v. Fulgham*, 181 Fed. 91; *Laidlaw v. Page*, 158 N. Y. 73."

The doctrine of the above case seems to clearly prohibit speculation and conjecture as the foundation upon which liability is imposed, and that doctrine, if our analysis is correct, has not been narrowed or qualified in any way by *Lavender v. Kurn.*

We respectfully submit that the desirability of having an authoritative determination of the questions of the vessel owners' liability for injuries sustained on shore leaves and their responsibility for the acts of employees who, themselves, are on shore leaves, plus the desirability of resolving the conflict in principle and decision between the Sixth and Ninth Circuits, fully warrants our requesting this Court to exercise its right to direct that the case be brought before it for final determination.

We submit that the prayer of the petition should be granted and the record in the case be directed to be sent to this Honorable Court in the furtherance of justice.

Respectfully submitted,

LUCIAN Y. RAY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 620.

THE BUCKEYE STEAMSHIP COMPANY,
Petitioner,

v.

JOSEPH McDONOUGH,
Administrator of the Estate of William F. Kerr,
Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF RESPONDENT'S POINTS.

This is a case under the Jones Act for the wrongful death of a seaman, caused by the negligence of a fellow crew member. It is unique in its facts, but the principles of law involved have all been delineated in the reported cases and no extension of the shipowner's liability is involved.

The District Court limited its decision to the peculiar and particular facts of this case, and the judgment has no far-reaching implications and opens no new fields of liability as Petitioner apparently fears.

Respondent's case is simply this: A seaman on shore leave yielded, as seamen do, to the temptation of becoming intoxicated. He reported back to the dock dazed, confused, staggering and obviously unable to meet the hazards of the dock.

The dock involved was a private one, completely fenced and guarded, with entrance possible only at the gatehouse. The pathway from gatehouse to vessel was perilous on both sides. To the left was the deep water of the Cuyahoga River channel, and the dock edge was open, flush, and unprotected by guard rails. To the right were the active tracks of the steel company's railroad, where switch engines moved the cars of ore from the unloading pits up to the mills. The pathway between the danger of the rails and the danger of the waters was only eighteen feet wide.

Because of these hazards the gatehouse guards refused to allow the intoxicated seaman to enter upon the dock. He was restrained, at the gatehouse, in a position of perfect safety.

While so detained another crew member, sober and rational, checked in at the gatehouse. At this particular dock it was the practice of the guards to telephone down to the vessel when an intoxicated crew member was detained at the gate, whereupon an officer would come up from the vessel to the gate to take charge of the impaired seaman and give him safe conduct to the ship. But it was also the practice that if another sober and competent crew member appeared before the telephone call was made, and if the competent crew member was willing, the guards would put the intoxicated man in the sober man's charge for safe conduct over the dock.

This practice was known to the ship's officers, and not only did they acquiesce but they admittedly preferred this practice since it saved a trip up from the vessel.

In accordance with this practice when one Clarence Cox, a fellow crew member who was sober, came along, he undertook to escort the intoxicated man to the ship and accordingly led the staggering, confused, intoxicated sea-

man from the safety of the gatehouse to a position of imminent danger halfway out on the dock, between the water and the rails.

There, however, the competent seaman abandoned his helpless shipmate, and walked on alone to his vessel.

The unfortunate, drunken sailor made his way alone some distance along the dock (indicated by the later discovery of his hat much closer to the vessel) and somewhere fell off the flush dock edge into the river to drown.

Respondent makes no claim that one sailor shepherding another in some uptown tavern can impose liability on the shipowner. We do submit that in the instant case the seaman on the dock proper, on the only available pathway to the ship, in the charge of a competent shipmate, was in the course of his employment and in the service of his ship when he was abandoned.

ADDITIONAL STATEMENT OF FACTS.

Respondent accepts the facts stated by Petitioner, but suggests additional facts which bear on the control the shipowner exercised over intoxicated seamen detained at the gatehouse.

An officer of the vessel, Third Mate Olson, testified that it was a frequent practice for not only members of the crew but also for licensed officers of the vessel to return to the vessel in an intoxicated condition, and that when a seaman did not return the vessel had to sail shorthanded until a replacement was secured (R. 55). If the vessel sailed shorthanded the other men would have to stand extra watches and would be paid overtime (R. 51). Olson further testified:

> "Q. Of course, then, the ship takes these sailors back aboard even though they are intoxicated? A. Yes, they do once in a while. You don't like them

coming back on board when they are supposed to stand watch, somebody else has to do their work, and so they try to get them back. Most places they call us and we have to come and get them. If the man is no good we just pay him off.

Q. I don't know whether you are speaking of the docks around the Lakes generally, but at least on the Corrigan-McKinney you have been told by the gate-house people when there was a seaman up there that was too much under the weather to let him go out on the dock? A. Yes. Most places they do.

Q. Then you send a man up to get him? A. Yes. If I can't go myself I send a reliable man up to get him.

Q. You would go yourself to get him? A. That is the best way.

Q. Of course, you knew at Corrigan-McKinney's and other Great Lakes docks, if another seaman is at the gate the guards will turn the intoxicated seaman over to him? A. Yes, they do that.

Q. That saves you sending a man up from the ship, saves a telephone call from the shore? A. Yes.

Q. You knew of that practice? A. Yes.

Q. It was accepted by the ship? That is, you never forbade that practice? A. No.

Q. So far as you were concerned didn't you actually prefer it? A. Sir?

Q. **Didn't you actually prefer that if there was another man at the gate they turn the drunken sailor over to him so you wouldn't have to go up from the ship yourself?** A. **YES.**" (R. 54, 55.)

ARGUMENT.

Point I. Shore leave cannot exclude a seaman from the course of his employment in a case where shore leave is in process of terminating, where the seaman has regained the private confines of the dock, and where the seaman has come under the general control of the master.

The usual, customary and only feasible method of traveling to and from a vessel at the docks is by means of a path approximately 18 feet wide which runs parallel to the river between the edge of the dock and adjacent railroad tracks for a considerable distance, and then turns away from the dock edge up to the guard house at the dock gate. The petitioner knew that its officers and men were required to travel over this pathway in leaving the vessel on shore leave and in returning to the vessel on completion of shore leave. (Finding of Fact No. 5.) It was while traversing this pathway between the guard-house at the gate and his vessel that the decedent came to his death, at a time when he was admittedly returning from shore leave.

Petitioner contends that shore leave is a purely personal mission and that the decedent while traversing the dock was accomplishing only a personal pursuit that could not be considered to be within the course of his employment nor in the service of his ship.

We believe that this contention has already been answered by this Court in *Aguilar v. Standard Oil,* 318 U. S. 724. The *Aguilar* case involved only the question of maintenance and cure, to which the seaman would be entitled if his injury occurred "in the service of his ship." The defendant there contended that a seaman was not in the ship's service if he were injured while traversing a pathway on a dock which was the only pathway between

a moored ship and the shore. The discussion in the *Aguilar* case concerning the business purposes of shore leaves is equally applicable to Jones Act cases:

> "* * * The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary * * * to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion. (318 U. S. 733-4.)
>
> * * * * *
>
> "Plaintiffs here were injured while traversing an area between their moored ships and the public streets by an appropriate route. It is true that in No. 454 the area consisted of the extensive premises of the Mexican Petroleum Company, at whose dock the ship was moored. And it is said the ship-owner should not be liable because he had no control over the premises. But it was the shipowner's business which required the use of those facilities. * * * Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock owner's negligence, cf. *Todahl v. Sudden & Christenson* (CCA 9th) 5 F. (2d) 462, does not relieve him of his duty of maintenance and cure. We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for injuries incurred

> on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them. That much at least is within the liability. How far it extends beyond that point we need not now determine. * * *" (pp. 736-7.)

Of course we do not contend that the ship owner would be liable to the seaman for the *dock owner's* negligence. We do contend that the ship owner would be liable for his own negligence even though the seaman was on the dock. We deem it significant that this Court in the *Aguilar* case, although it excluded liability for the dock owner's negligence, does not exclude liability for the ship owner's negligence occurring on the docks.

Petitioner stresses the case of *Todahl v. Sudden & Christenson,* 5 F. (2d) 462. The *Todahl* case held in its first syllabus that a seaman who had suffered injury on a dock could not recover from the ship owner for the reason that the Jones Act does not extend to torts occurring on land but rather permitted recovery only for injuries sustained on board the vessel. Obviously this portion of the decision in the *Todahl* case is no longer the law. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U. S. 36.

The *Todahl* case further held in Syllabus 3 that the ship owner was not liable for injuries received due to a defective condition of the wharf caused by the dock owner's negligence. This portion of the decision is not applicable to the instant case inasmuch as decedent's death was not caused by any defect of the wharf but rather by the negligence of his fellow seaman.

The third portion of the decision in the *Todahl* case does support Petitioner's contention that a seaman on shore leave is not engaged in the service of the ship and is not in the course of his employment. This final portion

of the *Todahl* case has been overruled by implication by this Court in the *Aguilar* case and has been superseded by the later case of *Marceau v. Great Lakes Transit Corp.*, 146 F. (2d) 416. The *Marceau* case is squarely in point. The plaintiff was a second cook who had left his vessel in the early evening in order to go ashore for personal business or recreation. He was due to return at 11:30 P. M. to provide the night lunch. During the course of his return, as he walked along the dock toward the boat he slipped and fell upon some wet flour or meal which had been deposited near the ship's ladder during the unloading process and had been allowed to remain there. The Court held that it was a jury question whether the ship owner was negligent in allowing the slippery meal to remain on the poorly-lighted dock in the immediate proximity of the ladder.

The Court in its opinion held specifically that even though the plaintiff was returning from shore leave he was nevertheless acting in the course of his employment while on the dock and was entitled to the coverage of the Jones Act. The Court said:

> "* * * Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route. Wong Bar v. Suburban Petroleum Transport, 2 Cir., 119 F. 2d 745. In Erie R. R. Co. v. Winfield, 224 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, the Supreme Court held that a railroad employee was engaged in interstate commerce and could recover for injuries sustained through the negligence of the railroad when incurred while leaving his work for the day and passing through the freight yard of the railroad. See to the same effect; Virginian Ry. Co. v. Early, 4 Cir., 130 F. 2d 538; Young v. New York, N. H. & H. R. R. Co.,

2 Cir., 74 F. 2d 251, at page 252; Atlantic Coast Line Ry. Co. v. Williams, 5 Cir., 284 F. 262. In Cudahy Packing Co. v. Parramore, 263 U. S. 418, 426, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532, the Supreme Court allowed an employee to recover workman's compensation for injuries suffered as in the course of his employment when he necessarily was going to his employer's factory and was killed by a locomotive on a railroad adjacent to the plant. See also Bountiful Brick Co. v. Giles, 276 U. S. 154, 158, 48 S. Ct. 221, 72 L. Ed. 507, 66 A. L. R. 1402. The recent decision of the Supreme Court in O'Donnell v. Great Lakes Co., 318 U. S. 36, 63 S. Ct. 488, 492, 87 L. Ed. 596, extends the protection of the Jones Act to seamen who are injured through the negligence of their employers while acting in the course of their employment even though the injuries occur on land. Chief Justice Stone, writing for the court, said: 'The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.' " (pp. 418-9.)

To similar effect see *Walton v. Continental S. S. Co.*, 66 F. Supp. 836, wherein a seaman returning to his ship from shore leave at nighttime over a dark dock mistook a coal chute on the dock for a gangway, and upon walking out over the coal chute fell into the water. It was held that the inattention of the ship's watchman at the gangplank was sufficient negligence on the ship owner's part to support a recovery. The defendant contended, of course, that since the plaintiff was returning from shoreleave as he came over the dock he was not acting in the course of his employment. This contention was rejected, the Court expressly refusing to follow the *Todahl* case and

on the contrary expressly approving and following the *Marceau* case and the *O'Donnell* case.

We submit, therefore, that in accordance with the doctrine of the recent cases a seaman passing over a dock on his only practicable route to the vessel while returning from shore leave, who suffers injury or death on the dock, is in the course of his employment. His act of traversing the dock is solely incidental to the ship's service, and arises out of the ship's service. The man would not be on the docks but for the necessity of rejoining his vessel and standing his watches. The District Court rightfully determined that seaman Kerr was in the course of his employment at the time of his death.

Point II. A sober seaman who agrees to further his ship's interest by escorting a helpless crew member from the dock entrance to the vessel, with full approval of that practice by the ship's officers, is in the course of his employment.

When Cox assumed the duty of escorting Kerr back to the ship he was performing a task that would otherwise have been performed by the ship's officers or another man acting under the direct orders of the ship's officers. Although Cox was not acting under direct and express orders at the time, he was following a practice which was not only known to the ship but was fully approved by the ship's officers for the understandable reason that it saved the ship's officers time and trouble.

In *Wong Bar v. Suburban Petroleum Transport*, 119 F. 2d 745, the plaintiff ship's cook was injured while leaving the vessel when a deckhand who was steadying the ladder for him let go of it. The defendant claimed that it was entitled to directed verdict for the reason that the

crew-member who was steadying the ladder was himself off duty and preparing to leave the vessel, and was assisting the cook as a personal gratuity rather than in the scope of his own employment. The Second Circuit Court said at page 746:

> "We can not accept this contention. An employee continues in the course of his employment until he has left his place of employment; hence on leaving the tug Seabrook and Wong Bar were acting in the course of their employment [citing cases]. It was to his employer's interest that Wong Bar should not be injured while so doing. Therefore, the deckhand would act within the scope of his employment in furthering the master's interest by assisting Wong Bar to leave the vessel."

Our case furnishes a parallel situation. It was to his employer's interest that Kerr should be freed from detention at the gate-house and to travel in safety the path over the dock to the vessel. Therefore Cox was furthering the ship's interest by agreeing to escort Kerr to the vessel, so as to release him from the guard's custody, and was further serving the ship's interest in giving Kerr safe conduct over the dock.

Petitioner questions whether the vessel owner should not be responsible for the acts of the escort unless the owner actually knew of the escort arrangement and selected the servant to perform the service. We believe that this contention overlooks the fact that the ship's officers knew that the guards at the gate-house would permit a sober fellow crew-member to escort a drunken crew-member back to the vessel, and approved of the practice for reasons of convenience. In legal effect the ship's officers had delegated to the guards at the gate-house the right to select the escort. If the ship owner was unwilling to rely on the guard's judgment as to the suitability of the

escort, it could easily have established a rule that every intoxicated sailor was to be detained at the gatehouse until an officer came from the vessel to get him.

It is clear that the Petitioner could have left Kerr at the gatehouse. The guards refused to allow him to go out upon the dock alone, and if the shipowner chose to let him remain there overnight Kerr could not have complained. In one sense there was no duty to give safe conduct, but in another sense, which is fully applicable in this case, there was a duty to make the safe conduct safe.

The actual course of events was that a fellow crew member, acting in the course of a custom and practice known to and fully approved by the Petitioner, did agree to give Kerr safe conduct over the dock to the vessel. He was not compelled to do so, but Petitioner must face the simple fact that he did do so. Once Cox agreed to escort Kerr over the dock, it is not open to argument that he had the duty to exercise ordinary care in performing his escort service.

Point III. The finding that Cox's negligence was the proximate cause of Kerr's death is the most reasonable and the most probable conclusion from the evidence.

Cox left Kerr, lying drunk and confused, in a position of hideous danger, about half way between the flush edge of the dock and the waiting waters of the river on the one side, and active railroad tracks on the other side. From this point on the record makes it abundantly clear that Cox acted with complete and callous indifference to his fellow seaman. He did not run or dog-trot to the ship. He walked. He said he walked a little faster than normal, but added in explanation "I was in a hurry, anyway, because I was a few minutes late" (R. 40). He said that on the way he looked back toward Kerr just once. He admitted

that from the time he reached the knuckle of the dock he did not look back at all, although had he looked there was enough light for him to see Kerr (R. 40).

The vessel was lying at the docks so that the stern of the ship was closest to Cox as he approached. When he arrived at the stern he found that the Third Mate, who was the officer in charge, was on the stern of the vessel and was only 22 or 23 feet from him (R. 37). Cox testified that he said nothing to the Third Mate:

> "Q. I mean at the time you were standing there looking over the dock toward Mr. Olson, who was a fairly short distance from you, did you say anything to him then?
>
> A. No, not while I was on the dock." (R. 38.)

The Third Mate testified that when Cox first came to the vessel Cox on the dock was only about 12 feet away from the Third Mate on the vessel and that Cox hollered something to the Third Mate which the Third Mate did not hear "because the Huletts was making noise," and the Third Mate knew that Cox wanted to come aboard (R. 52). At this very time there was a deck hand on the dock close enough to the Mate and to Cox so that the Mate could have shouted orders to him. We submit that a person of reasonable prudence would have had some appreciation of the grave danger to Kerr and would have sought immediate help from the Third Mate and from his available deck hand on the dock. It was the failure to obtain help at this time which the District Court relied upon as the chief finding of negligence.

Cox got aboard the vessel by riding the platform on one of the Hulett's buckets (R. 38), which was unloading the hatches amidships. This means that Cox had to walk from the stern of the vessel down to the point where the Huletts were working, signal the Hulett operator to pick

him up, ride on board on the bucket, and then locate the Third Mate. In view of the fact that the vessel was 387 feet in length this act on Cox's part necessarily consumed far more than a moment or two.

Further, at the time Cox first reported to the Third Mate the vessel was not moving and the deck hand on the dock was standing by waiting for further orders (R. 53). Cox gave the Mate no detail as to where he left Kerr—merely saying that he was "drunk" and was "down on the dock a way." We submit that in view of the delays that had occurred up to this point the Third Mate should have given immediate orders to the deck hand who was on the dock to go back and locate Kerr.

Instead, the Mate walked down to the engine room and told the Assistant Engineer that his coal passer was "down on the dock drunk" (R. 53, 54).

When the Assistant Engineer, Mr. Hackett, came on deck the vessel was then being shifted and he lost ten or fifteen minutes more before getting down to the dock and starting to look for Kerr (R. 25, 27, 30). Hackett is the only man involved who seemed to show any concern for Kerr. He went out to search for him as soon as he could do so, aroused the guards, and participated in a general search of the dock. The search disclosed nothing but Kerr's hat, which was found near the knuckle of the dock, a considerable distance from where Cox had last seen it on Kerr's head (R. 39). The significance of the hat is simply this—the finding of the hat much closer to the ship than the point where Kerr had fallen indicates that Kerr had risen and walked or staggered that distance. We do not claim that the location of the hat marks the point where he fell into the river. Obviously he could have staggered about for several minutes more after losing the hat before eventually falling over the edge of the dock and into the river.

The Trial Court was clearly justified in finding Cox negligent in not reporting Kerr's danger at the earliest opportunity and in not getting the aid of the other deck hand on the dock at a time when Kerr's life could certainly have been saved, and equally justified in finding that this negligence was a direct and efficient cause of Kerr's death.

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." (*Lavender v. Kern*, 327 U. S. 645, at 653.)

We submit that it is the most reasonable inference in this case that Kerr would not have drowned in the Cuyahoga River if Cox had not abandoned him.

We know with certainty that after Cox did abandon his escort duties Kerr reached the waters of the Cuyahoga River and drowned. An analogous situation was presented to the Court in *Harris v. Pennsylvania R. R. Co.*, 50 F. 2d 867. In that case a seaman, by his own neglect, had fallen off his vessel in the night. He surfaced and called to his ship to throw him a line. A crew-member on deck attempted to throw him a 6-inch hawser which was so heavy he could not heave it more than 10 feet, and in his excitement failed to see or use a light heaving line which might have reached the man struggling in the water. The accident happened during the night and the man overboard quickly passed from view to the stern of the vessel and was drowned. The Court held that there was sufficient evidence of negligence in the attempted rescue of the drowning man to present a jury question. The District Court granted a directed verdict on the ground that it was merely a matter of speculation whether the decedent would have been able to save himself if a heav-

ing line or life buoy had been used. The Circuit Court held that there was "in fact testimony tending to show a reasonable probability of rescue, had a life-line or heaving line been used, to justify the submission of the question to the jury."

The decision in the *Harris* case was cited with approval by this Court in *Curtis v. Baltimore Insular Line, Inc.*, 287 U. S. 367 at 377.

To the same effect see *DiNicola v. Pennsylvania R. R. Co.*, 158 F. 2d 856, wherein it was held that the operator of a harbor tugboat had the duty to attempt to rescue a seaman after the seaman fell overboard, and that the question whether the crew of the tug could have done anything effective to save the seaman was for the jury.

Another important case along the same line is *Kirincich v. Standard Dredging Co.*, 112 F. 2d 163, wherein it was further held that it was completely irrelevant how the seaman got into the position of danger. The Court therein said:

> "As there is no substantial suggestion of suicide it is immaterial whether he carelessly slipped, or, as his messboy friend waiting on the dock said, whether a careless bump precipitated him. To the duty of rescue there is no defense of contributory negligence."

We think it must be obvious in the "man overboard" cases that there never could be proof of a mathematical probability that any rescue method which might have been attempted would have been successful. It does take some measure of speculation for the jury or the trier of the facts to conclude that the possibility of success in a rescue effort is so strong that death is the probable result of abandoning rescue efforts. If, however, the conclusion that rescue would be successful is one which reasonable minds might reach, then that finding should not be disturbed by a reviewing court.

A case bearing some analogy to our factual situation is *Reck v. Pacific-Atlantic Steamship Co.*, 180 F. 2d 866. The plaintiff seaman in that case had gone into delirium tremens, owing to severe intoxication, and was violent and unbalanced. A fellow seaman was assigned to watch over him in his room. His guard left him unattended for about five minutes, during which time the plaintiff departed. He was found after a general search of the ship in the hold below an open hatch, severely injured. Verdict for the plaintiff was returned and affirmed over the defense objection that it was sheer speculation to conclude that the five-minute abandonment of the mentally confused plaintiff was the cause of his prowl about the ship and fall through the hatch, the Appellate Court relying heavily upon *Lavender v. Kern, supra.*

To like effect see *Casey v. American Export Lines,* 173 F. 2d 324, which was an action under the Jones Act for the death of the ship's master who was found burned to death in the office of his quarters. There was evidence of negligence on the part of other ship's officers in failing to discover the fire and in delays in controlling the fire. On the question of proximate cause the Second Circuit Court said:

> "It must also be conceded that the precise moment of Captain Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire-hose had been available under sufficient pressure without any delay, one can not know with certainty that the captain's life would have been saved. But almost every verdict of a jury involves the element of speculation or conjecture to some extent. [Citing *Lavender v. Kern,* 327 U. S. 645] * * * We can not say that the record herein is bare of any evidence to support the jury's inference that the negligence of the defendant contributed to the death.

> * * * Courts are not at liberty to re-weigh the evidence and set aside the jury's verdict merely because the jury could have drawn a different inference. Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35. In our opinion the causal relation between the negligence and the death was a question for the jury."

We submit that the District Judge was amply supported by the evidence when he held that

> "It is difficult to conceive that any inference is as reasonable as the one which points to the conclusion that the negligence of Cox was the proximate cause of Kerr's death." (R. 63.)

CONCLUSION.

The decision in this case has not required the formulation of any new principles or doctrines. The law which was applied by the District Court to the Findings of Fact consisted of reported opinions of Circuit Courts of Appeals, as cited in the memorandum opinion of the District Court appended at Record 58-64. We see little merit in debating theoretical questions as to what the liability might be, under different facts, for unknown or unapproved escort service upon city streets outside the fences and gates of the dock. Under the particular and limited facts of the instant case there has been no error below and there is no debatable issue of broad scope and general interest. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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